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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 342

1. ROBERT N. BAEHR,
2. CHARLES BARON,
3. LEONARD BROWDE,
4. JOSEPH BURKE,
5. JACK DANIELS,
6. JOHN DORSEY,
7. MARSHAL FARR,
8. MILTON GLOGER,
9. FRANCIS GUARINI,
10. HAROLD HAGGERTY,
11. ELMER KOVACH,
12. ETTORE MOGLIA,
13. LEONARD NASH,
14. PHILIP PORRINE,
15. ROSE PORT,
16. JOSEPH RALL,
17. HENRY SCHMER,
18. LAWRENCE UNGARTEN,
19. LEO WEINSTEIN,

Petitioners

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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August 15, 1962

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl L. Shipley, Thomas A. Ziebarth and Samuel Resnicoff on behalf of petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-captioned case on May 18, 1962.

OPINIONS BELOW

The order of the United States Court of Claims dated May 18, 1962, is unreported and is set out *infra* as appendix A. The decision of Classification Appeals Office of the United States Civil Service Commission of April 7, 1960, is set out *infra* as appendix B.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 USC § 1255.

QUESTION PRESENTED

Whether a suit by a group of federal civil service employees seeking a money judgment for the loss of salary they suffered by reason of the arbitrary failure and refusal by the Civil Service Commission to readjust the pay of their positions in accordance with the substantive and procedural requirements of the Classification Act of 1949, 5 U.S.C. § 1071 *et seq.*, constitutes a claim upon which relief can be granted by the United States Court of Claims.

STATUTES INVOLVED

Chapter 91 of the Judicial Code of The United States; 28 U.S.C. § 1491, *Claims against the United States generally,* provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *"

The Act of October 28, 1949 (The Classification Act of 1949), as amended, 63 Stat. 954, *et seq.*; 5 U.S.C., §§ 1071 to 1112, provides in pertinent part, as follows:

Chapter 21.—Classification of Civilian Positions

Subchapter I.—General Provisions

* * * * * *

§ 1071. Congressional declaration of policy.

It is the purpose of this chapter to provide a plan for classification of positions and for rates of basic compensation whereby—

(1) in determining the rate of basic compensation which an officer or employee shall receive,

(A) the principle of equal pay for substantially equal work shall be followed, and (B) variations in rates of basic compensation paid to different officers and employees shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of officers and employees to efficiency and economy in the service; and

(2) individual positions shall, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined in section 1091 of this title, and the various classes shall be so described in published standards, as provided for in section 1094 of this title, that the resulting position-classification system can be used in all phases of personnel administration.

* * * * * *

SUBCHAPTER IV.—FUNCTIONS OF CIVIL SERVICE COMMISSION

§ 1101. General authority of Commission.

(a) Notwithstanding section 1102 of this title, the Commission shall have authority, which may be exercised at any time in its discretion, to—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of any position;

(2) place in an appropriate class and grade any newly created position or any position coming initially under this chapter;

(3) decide whether any position is in its appropriate class and grade; and

(4) change any position from one class or grade to another class or grade whenever the facts warrant.

* * * * *

(b) Any employee or employees (including any officer or officers) affected or any department may request at any time that the Commission exercise the authority granted to it under subsection (a) of this section and the Commission shall act upon such request.

STATEMENT

Each of the petitioners is permanently employed as a Claims Examiner (Retirement), GS-993-9, at the New York Payment Center, Bureau of Old Age and Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare. In the court below they sought judgments for the differences in pay between the GS-9 level which they were actually receiving and the GS-11 level to which they claimed they were entitled. These positions are in the classified civil service of the United States and come within the purview of the Classification Act of 1949, as amended, 5 U.S.C. § 1071 *et seq.*

Petitioners initially sought to effect a reclassification of their positions administratively on June 27, 1956 when they filed an appeal with the United States Civil Service Commission. Further appeals were filed on August 30, 1957 and on October 21, 1959. In each instance these appeals were denied by the Civil Service Commission.

On June 30, 1960, petitioners filed their suit in the United States Court of Claims seeking a money judgment for the differences in pay between the GS-9 and GS-11 levels dating back to the initiation of the first administrative appeal in 1956.

Petitioners filed a motion for summary judgment on June 16, 1961, and the government filed a cross-motion for summary judgment. The court, in an order without opinion, granted government's motion and dismissed petitioners' case, Appendix A, *infra*, on the grounds that it "failed to state a claim upon which relief may be granted." It is that order to which this petition for a writ of certiorari is addressed.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Claims Erred in Holding That Petitioners Failed to State a Claim Upon Which Relief Can Be Granted

Petitioners' claim is for the difference in pay between the GS-9 and GS-11 levels. It is predicated upon the Classification Act of 1949, *supra*, the declared purpose of which is

> "to provide a plan for classification of positions and for rates of basic compensation whereby (1) in determining the rate of basic compensation which an officer or employee shall receive, (A) the principal of equal pay for substantially equal work shall be followed. * * *"

In a series of administrative appeals to the Civil Service Commission, petitioners sought, unsuccessfully, to have the pay of their positions as Claims Examiners (Retirement) GS 939-9, in the Bureau of Old Age and Survivors Insurance readjusted from GS-9 to GS-11. It was petitioners' contention that the positions which

they occupied and the work which they performed were substantially equal to those assigned to Veterans Benefits Authorizers, GS-11, in the Veterans Administration. A large body of evidence supporting this position was submitted by petitioners both at the administrative level and to the court below.[1]

The government never disputed petitioners' contention that the work of the two positions is substantially equal.[2] In fact, the only time any comparison was made between the two positions, there was a specific finding of fact that they *were* substantially equal.[3]

In the subsequent appeals to the Civil Service Commission this finding by the employing agency was never questioned. The decisions of the Second U. S. Civil Service Region and the Classifications Appeals Office of the Civil Service Commission (Appendix B, *infra*) made it clear that a comparison of the two positions was not and would not be made.

The Civil Service Commission looked only to its own published standard (GS-993 series) in deciding peti-

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[1] Since petitioners' suit was dismissed for failure to state a claim upon which relief may be granted, the Court of Claims never reached this question.

[2] In its cross-motion for summary judgment in the court below the government merely contended that petitioners' claim raised issues of material fact.

[3] In the Departmental decision rejecting petitioners' reclassification request, dated February 3, 1958, the employing agency (HEW) stated:

> "It, therefore, appears that up to this point, except for the requirement of full professional legal training, that the position of Claims Examiner, GS-993-9-6615, has the characteristics of positions to which the Adjudicating Series, GS-960-0 is applicable. . . ."

tioners' appeal. It arbitrarily refused to re-examine the validity of its published standard despite the overwhelming evidence supplied by petitioners that they were performing work substantially equal to their GS-11 running mates in the Veterans Administration and that the published standard was founded on a specious premise with respect to the essential nature petitioners' work. The Civil Service Commission characterized petitioners' contention as roaming afield "in search of secondary or other questionable criteria when more valid sources are obtainable," (the "more valid sources" in this instance being the Commission's own published standards.) Appendix B, *infra*.

The attitude of the Commission was much like that of the Railroad Retirement Board in *Duquesne Warehouse Co.* v. *R. R. Retirement Board*, 148 F. 2d 473, 477, where Judge Hutcheson remarked,

> "But, says the Board in effect, the question is not what the courts think the act under construction here means, it is what the Board thinks it means, and the Board has spoken. Thus, by virtue of being constituted the Board to administer the Act, the Board has been endowed with a prescience, invested with a prepotence, in respect of statutory construction to which the courts must bow though the facts are undisputed and the question is entirely one of law. Thus by the simple expedient of having a lawyer, under the dignified name of General Counsel for the Board, issue an opinion and then adhering by a bare majority to that opinion, the Board is enabled to read the statute as it will."

Having thus exhausted their administrative remedies, petitioners filed their claim in the United States Court of Claims. That court dismissed the petition

(Appendix A) without an opinion. By reference to the government's motion for summary judgment it appears that the court below adopted the argument that the decision of the Civil Service Commission followed the procedures required by law and that petitioners were, in effect, seeking to "try title to an office they do not hold" (R. 120-124). In support of this position the government cited the decision of this Court in *United States* v. *McLean*, 95 U.S. 750 (1877) and the Court of Claims decision in *Coleman* v. *U. S.*, 100 C.Cls. 41 (1943), *Dvorkin* v. *U. S.*, 101 C.Cls. 296, certiorari denied, 323 U.S. 730 (1944), and *Price* v. *U. S.*, 112 C.Cls. 198 (1948).[4]

The government's reliance upon *U. S.* v. *McLean*, *supra*, is misplaced for the question there of whether claimant was entitled to extra compensation depended upon a *discretionary* act by his superior. In the instant case there is no discretion given to the Civil Service Commission. The Classification Act of 1949 clearly *requires* that agency to follow the principle of equal pay for substantially equal work. The *Coleman*, *Dvorkin* and *Price* cases, *supra*, are similarly inapplicable since they each involve a situation where the claimant was *appointed* to one position but did the work of a *different* and more highly compensable position.

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[4] But see *Belsky* v. *U.S.*, 290 F. 2d 593 (1961), where the Court of Claims found that a doctor, inducted into the Army as a private, was entitled to the pay of a captain where the record showed that he was "doctoring as a doctor and not as a G.I." The court said.

> "And the fact that, in the Army, the plaintiff served exclusively in that capacity is not without significance. It adds a 'quantum meruit' flavor to his claim. It shows that the Government received the services for which plaintiff seeks compensation."

This is not the situation with petitioners herein. Under Section 1091 of the Classification Act of 1949, the term, "position," is defined as:

> ". . . The work, consisting of the duties and responsibilities, assignable to an officer or employee;"

Petitioners already hold the office *and* do the work of Claims Examiner (Retirement). They already perform a clearly defined body of "duties and responsibilities" assignable to that office or position. Their claim is that they are not receiving the salary which is properly assignable to the position which they already hold.

28, U.S.C. § 1491 confers general jurisdiction on the United States Court of Claims to render judgment upon any claim against the United States founded upon any Act of Congress or upon any regulation of an Executive Department.

Petitioners' claim against the United States is founded upon the violation by the Civil Service Commission of the Classification Act of 1949, 5 U.S.C. Section 1071 *et seq.* As a result of this violation petitioners have suffered a substantial and continuing loss of pay.

In these circumstances petitioners respectfully submit that they have stated an actionable claim against the United States in the court below and that the Court of Claims is bound to hear their claim.

2. This Case Presents an Important Question Affecting the Right of Federal Employees to Seek Judicial Review of the Propriety and Legality of Standards published by the Civil Service Commission Pursuant to the Classification Act of 1949.

This case is important far beyond the mere claim of petitioners for the extra compensation to which they believe they are entitled. As the government pointed out in its brief below (R-102n)

> "Although only 19 plaintiffs are named in this suit, there are 910 individuals occupying the same positions in the same grade who will be affected by the decision in this case."

Moreover, if the decision below is permitted to stand, no government employee in the classified Civil Service will be able to seek a judicial determination of his right to just and equitable compensation as defined and guaranteed by the Classification Act of 1949.[5]

If the words of Congress in setting forth the basic objective of the Classification Act (i.e. "equal pay for substantially equal work") have any meaning at all they must have been intended to create a substantive right in federal employees to have a rate of compensation assigned to their position which is consistent with this stated legislative intent.[6]

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[5] This Court has never had occasion to construct this Act.

[6] Congressional concern with the principle of "equal pay for substantially equal work" is by no means confined to the Classification Act of 1949. In the current session, the House of Representatives has passed H.R. 11677 entitled, the Equal Pay Act of 1962, which would forbid discrimination in rates of pay for the same work as between men and women employees of *non-government* employers. See: Report No. 1714, Committee on Education and Labor, 87th Cong., 2d Session, May 17, 1962.

The Civil Service Commission is charged under the Act with the responsibility for placing positions in their appropriate class and grade. 5 U.S.C. § 1101(a). Under subparagraph (4) of this section the Commission may "change any position from one class or grade to another class or grade whenever the facts warrant." Any employee affected may at any time request the Commission to exercise this authority, and by the terms of 5 U.S.C. § 1101(b) "the Commission *shall* act upon such request." (emphasis supplied)

Classified federal employees plainly were given a procedural right by Congress to request the Civil Service Commission to exercise its authority in this regard and the Commission is bound to act upon such requests in a manner consistent with the law.

In the instant case petitioners contend that the standards published by the Commission for their position were inappropriate as to rate of compensation.

Application was made to the Commission pursuant to 5 U.S.C. 1101(b). The Commission held that since it had already published a standard for petitioners' position it would not reconsider the validity of that standard (as it was required to do under the law) but would merely measure the merits of petitioners' contentions in the light of the standard which it had already published. The Commission's final decision (Appendix B, *infra*) states it succinctly:

> ". . . To roam further afield in search of *secondary* or other *questionable* criteria when *more valid* sources are obtainable would not be in consonance with the law. This is one of the reasons we have applied *only* the GS-993 series in reaching a decision in this case." (italics supplied)

The Civil Service Commission takes the view that once it has published a standard for a position no classification appeal will be allowed except in the light of that standard. The court below, is dismissing the petitioners' claim, has signified its approval of this practice.

CONCLUSION

WHEREFORE, petitioners pray that this petition for a writ of certiorari to the United States Court of Claims be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 257-60

ROBERT N. BAEHR, ET AL.

v.

THE UNITED STATES

Order

This case comes before the court on plaintiffs' and defendant's motions for summary judgment. Upon consideration thereof, together with the opposition thereto, oral argument of counsel and the briefs of the parties, it is concluded that plaintiffs' petition fails to state a claim upon which relief may be granted, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted, plaintiffs' motion for summary judgment is denied, and plaintiff's petition is dismissed.

BY THE COURT,

/s/ MARVIN JONES
Marvin Jones,
Chief Judge

May 18, 1962.

APPENDIX B

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

IN REPLY PLEASE REFER TO
ICC:DSW:ibh

April 7, 1960

Mr. Samuel Resnicoff
Counselor at Law
280 Broadway
New York, New York

Dear Mr. Resnicoff:

We have completed our review of the classification appeals filed by you in behalf of Mr. Jack P. Daniels and 18 other Claims Authorizers employed by the Bureau of Old Age and Survivors Insurance, Social Security Administration. Included in our review were the arguments presented in your memorandum in support of the appeals.

After careful consideration and analysis of all of the facts, we found ourselves in substantial agreement with the Second Region's decision on all major points in the case. The appeals of your clients are therefore denied.

We concluded that the casework handled by the appellants was comparable to that visualized in the GS-993 standards at the GS-8 level. Evaluation of the casework to that grade, we believe, readily recognizes and gives full weight to the unusual degree of complexity inherent in the casework for which they are responsible. An additional grade was granted for "finality of action", i.e., the responsibility vested in and the full 100% review required of the appellants in authorizing payment of or disallowing a claim.

With respect to your argument that the duties and responsibilities of the appellants are substantially similar to those of the Veterans Benefits authorizer and that the

Adjudicating Series should be applied to the positions of your clients, the following explanation is deemed to be pertinent. When standards are available which are directly in point with duties and responsibilities in question, other sources of reference cannot be used in the resolution of classification appeals. Such is the case here. The GS-993 Retirement and Old-Age Insurance Claims Examining Series is applicable on all fours to the issues involved in these appeals. To roam further afield in search of secondary or other questionable criteria when more valid sources are obtainable would not be in consonance with the law. This is one of the reasons that we applied only the GS-993 series in reaching a decision in this case.

Your arguments with respect to the equal pay principle and to the validity and applicability of standards deserve some comment. The concept of writing and issuing standards so that they would be consistent on a cross-series basis was designed, among other things, to obtain the objective of "equal pay for equal work." Since the Commission was given, by statute, the responsibility for developing position standards, it has been constantly striving to improve its standards through revisions or issuances of new series. Through this continuous review method an attempt is made to assure equity as among positions in the Service and to provide a sound basis for the compensation of employees in a fair manner.

Prior to the establishment of the GS-993 series, a rather comprehensive study was made of the claims examining positions in the Social Security Administration. Inclusion of the positions in the GS-993 series was the result. The standard implementing that finding was published no longer than two years ago. That decision recognized the nature of the functions, the characteristics of the work and the qualifications required to perform duties assigned to positions concerned with claims adjudication in the Bureau of Old Age and Survivors Insurance.

Because of the recency and coverage of the GS-993 series, that criterion was considered by this office to be the most valid and reliable measure to apply to the positions of the appellants. Your request to use other standards, as a consequence, cannot be complied with. This determination is made in conformance with our responsibility under the law to apply the most pertinent standard available to positions under consideration.

We regret that a decision in your favor was not possible.

Sincerely yours,

/s/ ASA M. MCCAIN, *Chief*
Classification Appeals Office
Bureau of Inspections and
Classification Audits

cc: Chief, New York Payment Center
Bureau of Old Age and Survivors Insurance
New York, New York

cc: Director of Personnel
Health, Education & Welfare
Washington 25, D. C.

cc: Director, Second Region